NO. 11893

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EUGENE LA MOORE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellee's Brief

On Appeal From the District Court for the Territory of Alaska, Division Number One.

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APPELLEE'S BRIEF

PRELIMINARY STATEMENT

Appellant, who was the defendant below, brings this appeal from his conviction of the crime of Murder in the First Degree in violation of Section 4757, Compiled Laws of Alaska, 1933, upon the verdict of a jury after a trial in the District Court of Alaska, First Division. The Honorable George W. Folta, presiding, sentenced appellant to the mandatory sentence of death by hanging.

STATEMENT OF FACTS

Appellant, Eugene La Moore, in company with one

Austin Nelson left a down town bar in Juneau, Alaska, at about 12:30 A.M., December 22, 1946, and walked together to a neighborhood combinaton grocery-liquor store in Juneau where they, after finding both the liquor and grocery store sections closed, rapped on the store door to get the owners' attention. Jim Ellen, the store owner, had his living quarters at the rear of the store and this fact as well as the fact that he frequently waited on customers after regular store closing hours was known to LaMoore and Nelson. When, in response to their rap Ellen appeared at the door, he was struck with a blunt instrument on top of the head several times, causing lacerations. He was then taken forcibly or carried to the rear of the liquor store which was part of the grocery store, where his throat was cut nearly from ear to ear, severing every large blood vessel in his neck. His exsanguinated body was found in a slumped position shortly before noon the same day and although Ellen was generaly known to have always carried a considerable amount of money on his person none was in his possession when his body was discovered. Likewise his safe, which was located in his living quarters at the rear of the store, had been opened and robbed.

Investigation led to the immediate apprehension and subsequent jury trial and conviction of Austin Nelson of Murder in the First Degree. Shortly before the date set for his execution Nelson confessed to his participation in the robbery and murder, and

implicated the appellant. Shortly thereafter, appellant in an oral statement to a Deputy U. S. Marshal, admitted his participation in the robbery of Ellen and later on the same day he signed a statement after again relating his participation in the plan and actual robbery of Ellen. His written statement was made in the presence of and to a Deputy Marshal and a local attorney whom he had requested to see. The attorney present advised him on his first seeing appellant that he could not represent him and was not there for that purpose and repeated words to the same effect before taking down appellant's statement which was made to the Deputy Marshal and the attorney jointly and while both of them were present. During appellant's trial a Government witness testified that he saw Nelson and LaMoore standing in front of Ellen's Store, in the doorway at approximately between 12:15 and 12:20 A. M., December 22, 1946. His identification of both Nelson and Appellant was positive and he further testified that he spoke to one of them on seeing them as he passed Ellen's Store. Likewise, the 32-caliber automatic pistol admittedly used by Nelson and appellant in connection with the robbery and killing of Ellen was recovered from the home of the appellant's parents-in-law with whom appellant and his wife lived.

It was on the basis of this and other evidence and numerous other corroborative circumstances, that the appellant was found guilty by a jury in the District

Court for the Territory of Alaska at Juneau, of First Degree Murder, in violation of Section 4757, Compiled Laws of Alaska, 1933.

ISSUES

I

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN PERMITTING THE INTRODUCTION OF DEFENDANT'S STATEMENT, GOVERNMENT'S EXHIBIT NO. 4, INTO EVIDENCE AS IT WAS A PURELY VOLUNTARY STATEMENT AND NOT GIVEN UNDER IMPROPER INFLUENCES.

Appellant suggests his confession was given under improper influences, and was not admissible in evidence, it being unreliable and untrustworthy. It is apparent, however, from his argument that the real contention is that the statement was made involuntarily. This argument is based entirely upon the supposition that the statement was in fact involuntarily made. The involuntary character of the statement is nowhere pointed out, and appellant's proposition is not supported by the testimony.

Confessions are presumed to have been voluntarily made.

> *Murphy v. United States* (CCA-7) 285 F. 801, Cert. Den. 261 U.S. 617.

Evidence was introduced to show that appellant made his confession on the day of July 1, 1947, to Walter Hellan, Deputy United States Marshal, des-

cribing his participation with Austin Nelson in the robbery and murder of deceased, (Tr. 28, 32) and at the same time appellant offered to execute a written statement to be made in the presence of Hellan and H. L. Faulkner, a Juneau attorney. (Tr. 30, 31) At about 8:00 P. M. on the evening of July 1, 1947, Faulkner, after advising appellant that he could not and would not represent him as his attorney, was told by appellant of the details of his, appellant's, participation in the robbery and murder, and shortly afterward dictated his confession to Faulkner and Hellan. At appellant's request Faulkner typed the confession as it was described by defendant, Faulkner reading each paragraph as it was typed. (Tr. 31, 32, 34, 55, 56, 58) When the confession was completely typed Faulkner read it to appellant (Tr. 33, 34) and then appellant read it, and upon finishing reading it appellant said it was all right and signed it. (Tr. 33) Thus, on three different occasions appellant voluntarily confessed to his participation in the crimes of robbery and murder. Both witnesses, Faulkner and Hellan, testified appellant was informed that Faulkner would not represent him as his attorney and further that he did not have to make a statement unless he wanted to, and no force, threats, coercion, or promises were made as an inducement. (Tr. 28, 32, 33, 52-58, 61, 179)

That appellant's confession was given freely and voluntarily may be inferred from his own testimony.

On direct examination in answer to the question, "Why did you make your statement as you did . . . ?" appellant stated, "To help him" . . . Austin Nelson . . . "by prolonging his life" . . . "to help save his life." (Tr. 120, 121, 122). On cross examination appellant admitted that he had a conversation with Walter Hellan on July 1, 1947, and told him, Hellan, that he, appellant, was with Austin Nelson when the robbery and murder of deceased was committed, and that the statement was voluntary with no force being used. (Tr. 125 and 126)

In Wilson v. United States (Sup. Crt. U.S.) 162 U.S. 613, 40 L Ed. 1090, it is said "The true test of admissibility is that the confession is made freely and voluntarily and without compulsion and inducement of any sort." The Court held as admissible statements made by the appellant to a United States Commissioner which were contradictory to statements made by him at his trial.

Confinement, imprisonment and being in irons in itself was not sufficient to justify the exclusion of a confession, where it appeared to have been voluntary, and not obtained by putting the prisoner in fear and by promises.

> *Sparf and Hansen v. United States* (Sup. Crt. U.S.) 156 U.S. 51, 55.

A confession made while the defendant was in custody under armed guards, wearing handcuffs was ad-

mitted in evidence as being voluntary where no promises or threats were made.

Greenhill v. United States (CCA-5) 6 F 2d 134

These authorities along with the following support the ruling of the trial court in admitting appellant's confession:

Lewis v. United States (CCA-9) 74 F 2d 173
Young, et al v. Terr. of Hawaii (CCA-9 163 F 2d 490
Murphy v. United States (CCA-7 285 F 801, Cert. Den. 261 U.S. 617
Marcus et al v. United States, 86 F 2d 854

Regarding appellant's mental strain, H. L. Faulkner testified appellant was not under any great mental stress or strain of any kind (Tr. 57) and his only physical restraint consisted of leg irons. (Tr. 45, 57) If defendant's own testimony merits belief, in view of the many contradictory statements he made concerning his confession while testifying in his own behalf, it must be resolved that he was not suffering from any mental condition which rendered the confession unworthy of consideration by the jury. On direct examination he described his mental condition as "all up in the air," and when again asked what mental condition he was in, replied, "I don't know." (Tr. 110, 111) It is not argued that he was mentally ill or that he was mentally exhausted from extended or harassing questioning by officers or other persons.

Skiskowski v. United States, 158 F 2d 177

Obviously the only mental strain and stress in which he was laboring was that of a man conscious of his own guilt in the robbery and murder of another. No authority has been found holding confessions made while under such mental stress and otherwise voluntary, inadmissible as evidence, and it is submitted that none can be found.

II

PLAINTIFF'S STATEMENT GOVERNMENT'S EXHIBIT NO. 4 WAS NOT GIVEN TO ATTORNEY IN THE COURSE OF PROFESSIONAL EMPLOYMENT AND DID NOT THEREFORE CONSTITUTE A CONFIDENTIAL DOCUMENT — ALSO THE STATEMENT WAS MADE TO AND IN THE PRESENCE OF A THIRD PERSON.

Appellant contends that his confession given to H. L. Faulkner and Walter Hellan is a privileged communication made to his attorney. Presumably the argument is based upon the Alaska Statute Section 4310, Compiled Laws of Alaska, 1933, which provides "An attorney shall not, without the consent of his client, be examined as to any communication made by his client to him, or his advice given thereon, in the course of his professional employment." This provision is identical with the Oregon Code, Vol. 1, Sec. 3-104-2, Oregon Compiled Laws Annotated 1940 and is said to be a declaration of the Common Law rule.

State ex rel. Hardy v. Gleason (Sup. Crt. Ore.) April 23, 1890, 23P, 817, 818

People ex rel. Vogelstein v. Warden of County Jail of New York County, (Sup. Crt. N.Y. Co.) 270 NYS 362

Wigmore on Evidence, 3rd Ed. Sec. 2292

The statute therefore must be construed in the light of the decisions on the subject. In order that communications to attorneys be classed as privileged and made inadmissible as evidence it is necessary that the professional relation of attorney and client exist at the time the communication is made; that the commnuication be made on account of that relation; and the communication is relevant to the subject-matter of the attorney's engagement, to enable the attorney to use his ability, skill, and learning in the discharge of his office of attorney in relation thereto.

York v. United States (CCA-8) 224 F 88

When tested by this principle it is submitted that the facts of instant case do not reveal a relationship of attorney and client exisiting between appellant and H. L. Faulkner, the Government witness, at any time; before, after, or during the time appellant made his confession.

H. L. Faulkner testified that he was never an attorney for appellant and when he first talked with him, July 1, 1947, advised appellant that he could not and would not represent him, and that he wanted appellant to clearly understand that he, Faulkner, was not his attorney. (Tr. 53) Again in the presence

of appellant and Walter Hellan, Faulkner told appellant he could not represent him as an attorney. (Tr. 56, 58, 61, 179) This testimony is verified by Walter Hellan. (Tr. 32, 182)

Authorities supporting the ruling of the trial court in holding that attorney and client relationship did not exist in instant case, and the general principle that where no attorney-client relationship exists, communications to an attorney, where relevant, are not privileged and are admissible as evidence, are as follows:

York v. United States, Supra
Steiner v. United States (CCA-5) 134 F 2d 931, 934-935
Bolling v. United States (CCA-5) 76 F 2d 390
Smale v. United States (CCA-7) 3 F 2d 101, Cert. Den. 276 U.S. 602
State v. Rush (Sup. Crt. W. Va.) 150 SE 740, 741

It has also been held that privilege does not extend to communications voluntarily made to a lawyer after he has informed the person making them that he will not accept employment in the matter to which the communication relates. 5 ALR Pg. 729

In People v. Hess, Supreme Court, New York, 40 NYS 486, 5 ALR Pg. 729, defendant was accused of shooting deceased. The examining magistrate who inquired into the homicide was attorney for defendant in other matters, and on being requested to represent defendant in the homicide prosecution, declin-

ed. Later, while visiting defendant in jail, defendant told the attorney as a friend, the details of the shooting. The Court held that under a statute providing for non-disclosure by attorney of communications of clients to them "given in the course of professional employment" the relation of attorney and client did not exist and defendant having been distinctly informed of the fact, the communication was admissible.

Even if the Court should have considered Mr. Faulkner as the appellant's attorney at the time the confession was made, another element prevails which takes the communication out of the privileged category. Appellant first told Walter Hellan of his participation in the robbery and murder of deceased. Then later he told Mr. Faulkner substantially the same story and later dictated the confession to Hellan and Faulkner while both were present and while the latter typed it. Hellan was in no way associated with the law office or practice of H. L. Faulkner. He was in fact a Deputy United States Marshal, well known to appellant, and at best could have been considered nothing less than an opposite and hostile party. "In order that the rules as to privileged communications between attorney and client or its reason shall apply, it is necessary that the communication by the client to the attorney or his clerk be confidential and be intended as confidential." 58 Am. Jur. Pg 274 Sec. 490. Appellant, in disclosing the facts first to Hellan and later to Hellan and Faulk-

ner, certainly indicated he did not regard the confession confidential. Therefore, the reason for the privilege ceases to exist, and the rule which protects privileged communications between attorneys and clients does not apply.

> *York v. United States*, Supra
> *Livezey v. United States*, (CCA-5) 279 F 496
> *State v. Mickle*, (Sup. Crt. Iowa) 202 NW 549
> *Crawford, et al v. Raible*, (Sup. Crt. Iowa) 221 NW 474
> 28 RCL Pg. 561 Sec. 151
> 58 Am. Jur. Pg. 275 Sec. 492
> Wigmore on Evidence, 3rd Ed. Sec. 2311

CONCLUSION

No reversible error was committed by the Trial Court in this case. It clearly appears from the transcript of the record that the Signed Statement of the Defendant, Government's Exhibit No. 4, was a purely voluntary statement made by appellant after being advised that he did not have to make a statement unless he wished to, and that it was made without any inducement, threats, coercion, physical or mental force, and without any offers or promises of reward. Further, that the defendant read the statement and that it was read to him before he signed it. The record also shows that the attorney to whom appellant made his statement told appellant several times in no uncertain language that he couldn't represent him and was not representing him as his attorney, prior to the taking of the statement which was

not in any event a statement of a confidential nature, as it was related at the same time to a third person and in the presence of said third person, and had been previously made by appellant to a Deputy U. S. Marshal.

The Judgment of the Trial Court should, therefore, be affirmed.

Respectfully submitted,

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